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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 302

T. JOHN LABORDE,

Petitioner,

vs.

JOHN ANSOLABEHERE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the
State of Nevada.

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State of Nevada.

The Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nevada entered in the above case on April 25, 1957.

OPINION BELOW.

The opinion of the Supreme Court of the State of Nevada is reported at 72 Nev. ....., 310 Pac. 2d 842.

The opinion of the trial court, The Third Judicial District Court of the State of Nevada, in and for the County of Lander, is unreported.

JURISDICTION.

The judgment of the Supreme Court of the State of Nevada was made and entered on April 25, 1957, and a copy thereof is appended to this Petition in the Appendix at page i. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED.

In a suit to enjoin Respondent's cattle from trespassing on waters appropriated to beneficial use for stockwatering purposes by Petitioner pursuant to State law, Respondent contended that the Taylor Grazing Act superseded and replaced the Stock Water Act of Nevada and that by virtue of a Taylor Grazing Permit to graze cattle within the area serviced by Petitioner's water, the Stock Water Act of Nevada was superseded and rendered ineffective insofar as it was in conflict with the Taylor Grazing Act of 1934, and the Court therefore had no jurisdiction to enjoin the trespasses. The trial court held the Taylor Grazing Act did not divest vested water rights and issued the injunction. The Supreme Court of Nevada re-

versed the trial court holding that the provisions of the Stock Water Act of Nevada governing the grazing use of the public lands were superseded and rendered ineffective by the enactment by Congress of the Taylor Grazing Act, and the Court therefore had no jurisdiction to enjoin the trespasses. The questions presented are:

1. Does the construction placed on the Taylor Grazing Act by the decision of the Supreme Court of Nevada render the Taylor Grazing Act unconstitutional as violating the 5th and 14th amendments of the United States Constitution by depriving Petitioner of property rights without due process of law and by taking Petitioner's private property for public use without just compensation?

2. Did Congress in its enactment of the Taylor Grazing Act intend to protect vested property rights by specifically recognizing and protecting inviolate water rights to the extent the same were recognized under State law including the Stock Water Act of Nevada prior to the passage of the Taylor Grazing Act by including the following language quoted from §315 (b) of the Taylor Grazing Act:

> "**Provided Further,** that nothing in this Act shall be construed, or administered, in any way to diminish or impair any right to the possession and use of water for mining, agricultural, manufacturing or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands, or which may be hereafter initiated or acquired and maintained in accordance with such law . . ."?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. Constitution of the United States, 5th Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. Constitution of the United States, 14th Amendment:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Taylor Grazing Act of 1934, 43 U.S.C. §315, et seq., particularly the following language from §315 (b):

> "**Provided Further**, that nothing in this Act shall be construed, or administered, in any way

to diminish or impair any right to the possession and use of water for mining, agricultural, manufacturing or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands, or which may be hereafter initiated or acquired and maintained in accordance with such law . . ."

4. Appropriations of waters on public lands, 43 U.S.C. §661, Act of 1866:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of court, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

"All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section."

5. Stock Water Act of Nevada, 1925, Chapter 201, Statutes of Nevada, 1925, Nevada Revised Statutes, §533.485 through §533.510:

"533.485 "Public Range," "range livestock" defined. As used in NRS 533.485 to 533.510, inclusive:

1. "Public range" means all lands belonging to the United States and to the State of Nevada on which livestock are permitted to graze, including lands set apart as national forests and lands reserved for other purposes.

2. "Range livestock" shall mean livestock which during the general period or season when they are being or are proposed to be watered at the place involved shall be subsisting chiefly or entirely by grazing on the public range.

533.490 Water for watering livestock declared to be a beneficial use.

1. The use of water for watering livestock is hereby declared to be a beneficial use except as provided in NRS 533.495. Subject to such exception, the right to use water for that purpose may be acquired in the same manner as the right to use water for any other beneficial purpose.

2. On application to the state engineer for any such right, it shall not be necessary for the applicant to state or prove or for the state engineer to determine in cubic feet per second of time the quantity of water the use of which is applied for or granted, but in all such applications and in all proceedings connected therewith and, also, in all proceedings either before the state engineer or the courts relating to the proof or establishment of a vested right to use water for watering livestock, it shall be a sufficient measure of the quantity of the water to specify the number and kind of animals to be watered or which have been wa-

tered, as the case may be. This subsection is not intended to imply that prior to April 1, 1925, it was necessary to specify, prove or determine the quantity of water in cubic feet per second, but is meant only to remove for the future any uncertainty that may have existed as to such necessity.

533.485 Subsisting rights not to be impaired. Whenever one or more persons shall have a subsisting right to water range livestock at a particular place and in sufficient numbers to utilize substantially all that portion of the public range readily available to livestock watering at that place, no appropriation of water from either the same or a different source shall subsequently be made by another for the purpose of watering range livestock in such numbers and in such proximity to the watering place first mentioned as to enable the proposed appropriator to deprive the owner or owners of the existing water right of the grazing use of such portion of the public range, or substantially to interfere with or impair the value of such grazing use and of such water right.

533.500 Duties of state engineer concerning approval, rejection of application.

1. Before approving any application for the right to use water for watering livestock, the state engineer shall determine, by examination on the ground or otherwise, that the right and use applied for will not contravene the policy of NRS 533.495. If he shall determine that the right applied for will contravene such policy, he must reject the application.

2. If the water applied for shall be along the course of or in the immediate vicinity of an established or customary driving route for moving livestock from one range to another, the state engineer may reject the application even if no previous right shall exist for any portion of such water, if he shall determine that such water will best subserve the public interests by being reserved for the watering of livestock while so being driven along such customary driving route.

533.505 Unlawful Acts; penalties.

1. Any person who, without the right so to do, shall, on two or more separate days during any season, water more than 50 head of livestock at the watering place at which another shall have a subsisting right to water more than 50 head of livestock, or within 3 miles of such place, with intent to graze the livestock so watered on the portion of the public range readily accessible to livestock watering at the watering place of such other person, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $500, or by imprisonment in the county jail not exceeding 6 months, or by both fine and imprisonment.

2. Each day's watering in violation of this section shall be deemed a separate offense.

3. Whenever, in any prosecution for such offense, it shall appear that the watering by the accused was not done at the watering place of another, but was done within 3 miles thereof, it shall be a sufficient defense for the accused to prove that he had no knowledge of the existence of such other watering place.

533.510 Prior rights not affected. Nothing in NRS 533.485 to 533.510, inclusive, shall be construed to affect the validity of rights to the use of water for watering livestock acquired under the previously existing laws of this state or to impair any existing vested right to the use of water for that purpose."

STATEMENT OF THE CASE.

This suit was instituted by Petitioner against Respondent in the Third Judicial District Court of the State of Nevada, in and for the County of Lander by Petitioner filing a verified complaint in which he sought to enjoin Respondent's cattle from trespassing on waters which were set forth in Petitioner's verified complaint as being appropriated by Petitioner pursuant to State law prior to the passage of the Taylor Grazing Act of 1934 (Rec. Vol. 11, pp. 1-4). Respondent, in his answer, admitted Petitioner's appropriation of the waters the subject of the complaint, pursuant to State law, but alleged in his first affirmative defense included in his answer that the area in question was situate in Nevada Grazing District No. 6, and that Respondent had been issued grazing permits by the United States Government to run cattle in the area under the Taylor Grazing Act (Rec. Vol. 11, pp. 5-8). In addition, in the second affirmative defense of his answer, Respondent made the following allegation:

"That the said above court does not have jurisdiction over the subject matter of this action, by

reason of the fact that the waters and the range area, the subject of this action, lie entirely within the public domain under the authority of the Federal Government as a portion of Nevada Grazing District No. 6, Bureau of Land Management, Department of Interior." (Rec. Vol. 11, p. 7.)

Thus, we have the federal question sought to be here reviewed initially raised in this action in the pleadings (Rec. Vol. 11, pp. 1-8).

The trial court concluded that the Court did have jurisdiction over this matter and issued the injunction. In the decision of the trial court, the question sought to be reviewed here was considered as follows:

"A number of questions are presented by this action. Paramount among these are:

1. Did the Taylor Grazing Act (48 Stat. 1269; 43 U.S.C.A. 315-315n) supersede and replace all state statutes concerning water on the public domain? It is to be noted that in posing this question no mention is made of livestock, grazing or use of the public domain itself. We are only concerned with water on the public domain." (Rec. Vol. 11, p. 10).

The trial court then went on in the opinion to conclude as follows:

"It is the opinion of the Court based on the facts and on the cases cited that the plaintiff obtained a vested right in the waters enumerated in his complaint and described in his complaint. Insofar as any right to adjoining public domain is concerned, the Court has no opinion, but as to water so far as the Federal Government and be-

cause the Federal Government gave the State the right prior to the Taylor Grazing Act to administer water, prior to the enactment of that law, those rights under the laws of this State became equal to real property and cannot be divested from the owner thereof without payment or condemnation or some other comparable method. It is, therefore, the order of the Court that the prayer of the complaint only in so far as water is concerned be granted." (Rec. Vol. 11, p. 11).

From this ruling of the trial court, Respondent perfected an appeal to the Supreme Court of the State of Nevada. In his assignments of error (Rec. Vol. 1, p. 3) Respondent again raised the federal question here sought to be reviewed, quoting Respondent's assignment of error VIII:

"VIII. The State of Nevada and its courts no longer have jurisdiction of the springs rising on the open public domain." (Rec. Vol. 1, p. 3).

The Supreme Court in its opinion affixed hereto in the Appendix on page vi ruled squarely on the federal question here sought to be reviewed and reversed the trial court, quoting from the opinion of the Supreme Court of Nevada in this regard:

"His defense of the lack of the court's jurisdiction is predicated upon the contention that when the United States, the owner of the said public lands, entered upon the control and administration thereof through the Act of Congress known as the Taylor Grazing Act, those features of the 1925

stockwatering act having to do with the control of grazing rights or privileges thereon were superseded and rendered ineffective. This contention must be sustained." (Rec. Vol. 1, p. 7).

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously interprets the Taylor Grazing Act so as to diminish and impair Petitioner's right to the possession and use of his waters which had vested or accrued prior to the passage of the Taylor Grazing Act of 1934, under existing law validly affecting the public lands. Such a construction of the Taylor Grazing Act is absolutely contrary to the express statutory language of §315(b) of the Act, which provides, inter alia:

> "**Provided Further,** that nothing in this Act shall be construed, or administered, in any way to diminish or impair any right to the possession and use of water for mining, agricultural, manufacturing or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands, or which may be hereafter initiated or acquired and maintained in accordance with such law . . ."

In the State of Nevada, water rights for stock watering purposes are property rights, and a stock watering right perfected pursuant to State law from a spring located on public domain is real property in every sense of the word. *Adams-McGill Co. v. Hen-*

drix, 22 Fed. Supp. 789, (D. Nev. 1938[1]). Prior to the passage of the Taylor Grazing Act by Congress in 1934, these rights were respected and the courts of the State of Nevada would, by injunction, protect the owner of the right to the extent the right was recognized under State law, by enjoining any infringement on these rights by any other stockman[2].

The use of water for stockwater purposes was long recognized as a beneficial use of water by the Courts of the State of Nevada prior to any legislative enactment on the subject by the Legislature of the State of Nevada, and the Courts protected the owner of the right to beneficially use the water for stockwatering purposes by enjoining trespasses on waters so appropriated[3]. The value of the right to beneficially use waters on the public domain for stockwatering purposes is absolutely dependent on the feed available to livestock watering at the spring. It is obvious from the standpoint of a livestock operation, that a stockwater right without forage available to stock watering at the waterhole is absolutely valueless to the owner of the right. This was recognized as a fact by the Legislature of the State of Nevada, and in 1925, the

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[1]The Court in this case held:

"We may assume that a right in or to a spring, whether the spring is upon the land of the vendor or upon land of the public domain, is real property."

[2]*Robison v. Mathis*, 49 Nev. 35, 234 Pac. 690;
Steptoe Livestock Co. v. Gulley, 53 Nev. 163, 295 Pac. 772;
In re Calvo, 50 Nev. 125, 253 Pac. 671;
Ttcaina v. Marble, 56 Nev. 420, 55 Pac. 2d 625.

[3]*Steptoe Livestock Co. v. Gulley*, 53 Nev. 163, 295 Pac. 772;
Robison v. Mathis, 49 Nev. 35, 234 Pac. 690.

Legislature enacted the Stock Water Act of the State of Nevada, Chapter 201, Statutes of Nevada, 1925, Nevada Revised Statutes, §533.485 through §533.510. The Preamble to this Act provides:

> "Whereas, the value of the right to water range livestock is directly dependent on the availability to the owner of such right of the grazing use of the public range in the vicinity of his watering place; . . ."

Therefore, prior to the enactment of the Taylor Grazing Act, we have stockwater rights recognized as property rights in the State of Nevada, and the courts protecting the owners of the rights in the quiet enjoyment of them. Is this concept to be destroyed by the enactment and administration of the Taylor Grazing Act? The intent of Congress in passing the Taylor Grazing Act was to recognize and protect these rights, not destroy them. This is why Congress included the following language in §315(b) of the Taylor Grazing Act:

> "That nothing in this Act shall be construed or administered, in any way to diminish or impair any right to the possession and use of water for mining, agricultural, manufacturing or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands, or which may be hereafter initiated or acquired and maintained in accordance with such law . . ."

The legislative history of this particular statutory language clearly indicates Congress recognized existing stockwatering rights on the public domain, spec-

fically recognized the Stock Water Act of Nevada, and therefore included the above-quoted language in the body of the Taylor Grazing Act as it was originally enacted in order to assure that the stock water rights which were vested and recognized under State law would in no manner be diminished or impaired by the passage of the Taylor Grazing Act.[4]

The language of §315(b) of the Taylor Grazing Act above-quoted was included in the Act even though Congress knew the language paraphrased an existing federal statute,[5] that is, 43 U.S.C. 661, enacted by Congress in 1866, which provides:

> "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of court, the possessors and owners of such vested

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[4]Hearings Before Committee on Public Lands, House of Representatives, 73rd Congress, First Session on H. R. 2835 (TGA) and 73rd Congress, Second Session on H. R. 6462 (TGA), June 7, 8 and 9, 1933, and February 19, 20, 21, 23, 28 and March 1, 2 and 3, 1934, Vol. 666, 1934.

Hearings Before Committee on Public Lands and Surveys, United States Senate, 73rd Congress, Second Session on H. R. 6462 (TGA) April 20 to May 2, 1934, Vol. 449, 1934.

Hearings Before Subcommittee of House Committee on Appropriations, in charge of Interior Department Appropriation Bill for 1937, 74th Congress, Second Session, Vol. 742, 1935, page 17.

Hearings Before Subcommittee of the Committee on Appropriations, House of Representatives, 75th Congress, First Session, on the Interior Department Appropriation Bill for 1938, Part 1, Vol. 797, 1937, page 89.

[5]Hearings before Committee on the Public Lands, House of Representatives, 73rd Congress, First Session on H. R. 2835 (TGA) and 73rd Congress, Second Session, on H. R. 6462 (TGA) June 7, 8, 9, 1933, and February 19, 20, 21, 23, 28 and March 1, 2 and 3, 1934, Vol. 666, 1934.

> rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage . . ."

The recent construction of this statute by this Honorable Court in the case of *United States v. Gerlach Livestock Co.* (1949), 339 U.S. 725, 94 L. Ed. 1231 is compatible with Petitioner's contention herein. The Court held:

> "This section was expounded by Mr. Justice Field in Jennison v. Kirk, 98 U.S. 435; 25 L. Ed. 240, as foreclosing further proprietary objection by the United States to appropriations [of water] which vested upon local customs. This Court regarded the Act as 'an unequivocal grant' for existing diversions of water on the public lands. Broder v. Natoma Water & Mining Co., 101 U.S. 274, 25 L. Ed. 790. Thus Congress made good appropriations in being as against a later patent to riparian parcels of the public domain, and removed the cloud cast by adverse federal claims."

The fact that Congress insisted on including the language above-quoted in §315(b) of the Taylor Grazing Act even though the Act of 1866 was in effect as borne out by the legislative history of the Taylor Grazing Act clearly indicates Congress specifically intended not to diminish or impair by the passage of the Taylor

Grazing Act the right to the possession and use of waters as they were enjoyed prior to the passage of the Taylor Grazing Act.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this Petition for a writ of certiorari should be granted.

Dated, Reno, Nevada,
July 15, 1957.

ELI GRUBIC,
Counsel for Petitioner.

JOHN S. DRENDEL,
WILLIAM O. BRADLEY,
Of Counsel for Petitioner.

(Appendix Follows.)